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# Communicative Action, Deliberative and Restorative Justice. A review

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## ABSTRACT

“Communicative Action, Deliberative and Restorative Justice – Socio-juridical perspective on mediational averment” by Antonio Sandu and Elena Unguru, published by TRITONIC in 2014, is a high level transdisciplinary lesson about transactional justice, restorative justice and deliberative alternative to classical (retributive and distributive). Antonio Sandu is Professor at the University “Ștefan cel Mare” from Suceava, and researcher at the Centre for Socio-Human Research Lumen in Iasi (Romania). The main interest of the author include ethics, bioethics, social assistance, social philosophy. He is the author of five books in Social Philosophy and Applied Ethics, more than 8 articles in scientific journals indexed by Thomson Reuters and over 20 other scientific articles. Elena Unguru is researcher in the fields of law, social work, sociology, communication, appreciative inquiry in Socio-Human Research Center Lumen from Iasi- Romania. We are led, naturally and professionally, on the sinuously road from conflict to communication also denoted by the establishment of the public sphere as social reality born of meeting and acceptance of the otherness, of individuality asserting in public space, postulating the universality of human nature as human rights. Starting from the Habermas’ idea of communication power as a form of expression in contemporary society, the author believes that communicative action codes a power strategy based on consensus. Power is soft, seductive, and inter-mediate linguistic and cultural relations. The chosen theme by the authors analyze the communication mediation model based on the values of social justice, equity and charity, assuming an exercise of the integration of the otherness, of perceiving the other as partner.

**Keywords:** communicative action; deliberative justice; restorative justice

## 1. INTRODUCTION

This paper was performed as part of the programe “*Communicative action and the social construction of affirmative -appreciative ethics*”, underway at the Centre for Research in Social and Human Science Lumen from Iasi. The starting idea of this project is that, “with paradigmatic changes occurred in understanding of the social space, new forms of communicative action come to supplement the old ones, or reinterpret them in the specific manner of the dominant interpretive agreement in the new societal paradigm” as the authors asserts. The project is based on constructionist option, whereby “*social reality is the result of an interpretative agreement, renegotiated between the communicational actors*” (Sandu & Unguru, 2014), and according which trades the social consensus.

The paper is structured in two sections: Conflict, communicational action and deliberative justice presented by Antonio Sandu and restorative justice vs. retributive justice as socio-juridical perspective presented by Antonio Sandu and Elena Unguru.

The first section, is stated by Aurora Ciuca in introduction of the book as being “the renegotiation of the interpretative agreement by the communicational actors as imperative of social consensus is read in the postmodern key of individual becoming, of human revolution in front of the Universe”. The proposed approach is a transdisciplinary one. Theoretical models and epistemic strategies that sustain the paper come from the sphere of legal sociology and law, but are analyzed from the perspective of the theory of communicative action proposed by Habermas (1987), being presented in detail in the paper, and contextualized to the transactional justice model, restorative and deliberative. The communicative action is the preferred model of power exercising in contemporary society (Sandu, 2014b). The theory of communicative action is in line of critical theory of society. An example of deliberative practice in public space is the mediation as an alternative to civil or criminal justice system. Massification of consumer society turns deliberation in a series of seductive practices, removing his character from rational discursive character.

The lesson of empathy that mediator should teach parties requires the sensing the situation of the other, understanding its mental, emotional, social or economic domains combined with a restorative justice that the authors argue, highlights the mediation of offender-victim relationship, restorative gestures and the awareness action of the offender on the impact and the dimensions of his act. In this paradigm the government is not the holder of the penalty monopoly, but affected actors by commission of an infraction: victim, offender, community. The averment is deeply impressed by human rights philosophy based on individual dignity, the averment has an individual size, enabling self-managing of recovery and the possibility of executing a freedom deprivation penalty and a collective one, interested to rehabilitate culpable, to prevent relapses and to support the victims.

Philosophical approach, especially that of social philosophy is infused by sociological, communicology, semiotics thinking, not least pragmatically. The authors show that what they tried is an “alignment in the transdisciplinary space, in that *no man's land* that provides the transparadigmatic retreatment and discursive reconstruction of the epistemic object depending on the receiver subject particularity”.

In the second section of the paper it is analyzed another perspective, alternative to the criminal justice, the restorative justice and its particular form, averment, based on the new changes in the socio-legal institution - as it is defined by new Criminal code.

It was used a transparadigmatic approach with reference to criminal justice, the criminal law, but not least alternatives of prison center paradigm. “This issue was approached, assert the authors, because, again, is a postmodern specific, that is based on deconstruction of punishment option, in right its restorative alternative”. Communication is again the constitutive frame of all restorative models, and Romanian criminal procedural system is aligned to this the paradigmatic change.

“We started in analyzing of this change of paradigm, state the authors, from Foucault's view that considers the punishment *a power of the technology*”.

## 2. CONFLICT, COMMUNICATIONAL ACTION AND DELIBERATIVE JUSTICE

Antonio Sandu makes a radiography of contemporary society thus "the post-modern society moves from a policy of otherness repression, to one of promote complementarity the alien, the different, become complementary to us and not the opposite" (Sandu, 2014), in which the communicative action replaces the strategic action and consensus replaces the Roman peace and dialogue replace the confrontation. Power is soft, "the marginalized ones become a protected otherness and the society is concerned with the establishment of a culture of difference which to replace the model of the normalization otherness" (Sandu, 2014). In this society, representatives of postmodernism seek to deconstruct the values they consider European cultural imperialism, universalism and progressivism, also that one being part of the European cultural model, democracy, constitutional state, separation of religion from politics, social justice, equal rights and dignity (Sandu, 2014) highlighted values of contemporary European society.

"The universalist and progressive model of European culture, says Antonio Sandu, is a product of the Enlightenment, based on Cartesian-Newtonian model for understanding the world from the physical", the space and time being infinite. For social physics as Comte defines sociology – the cultural space is universal and universalizing cultural values, the time serving to measure the infinite progress of society. Relativized space - as a result of Einsteinian physics - generates the idea of cultural pluralism and cancel the myth of progress. "The inseparability principle from physics, between subject of knowledge and knowing subject, generates similarly the perspective of complementary otherness instead of disjoint " (Sandu, 2014).

In this context, civil society is seen as a combined series of non-state elements, constituted voluntary and structuring public opinion (Habermas, 1987). Civil society is placed in natural law, being a constituent of *social philosophy* as a proposal to replace *traditional political philosophy*. Thus, Habermas's model draws attention on centering the Kantian model of practical reason on subjectivity, to the detriment of intersubjectivity", bringing in our attention, Antonio Sandu citing Bondor, that "rational self universality assumption at moral and political level allows to modern social political thinking to postulate the universality of human nature expressed as human rights"(Bondor, 2011).

According to the constructionist model that shows reality is created in the communication process with the language tools, each individual influencing and modeling the responses of others, in this case, Antonio Sandu believes that "this paradigm can be traced to the theory of communicative action defined by Habermas (1987), communicative action is preferred model of the exercising of power in contemporary society", the author relating between philosophical perspectives and the reference to the text of the law and legal analysis with constant returning to philosophical meanings, of the analyzed ideas. Antonio Sandu explains that he does not realize a philosophy of mediation, but that he has used the legal text, "where appropriate, and the prospect of transactional justice, restorative and deliberative, as alternatively classical extrajudicial justice, to reveal their views and models on the very idea of communicative action".

Devoted to constructivist paradigm, Antonio Sandu advocates for appreciative mediation model with related styles (facilitative, evaluative, transformative, narrative), it being understood as part of the appreciative ethics. The author develops the theory of appreciative inquiry (*appreciative inquiry*, a concept proposed by D. Cooperrider) as practice of obtaining consensus by shifting the emphasis from the traditional approach to the necessity of finding a solution on valuing the strengths and building an attitude oriented towards performance.

Antonio Sandu assigns an ample analysis of European legal framework and the Romanian concerning mediation being presented numerous nuances and interpretations on the law mediation from Romania, adopted as a result of "Praetorian" initiatives as well senses Adriana Ciuca in introduction of the book, "are captured and commented with finesse and balance, the author thoroughly arguing the benefits of this alternative procedure and necessity of informed consent of the parties, of observing the principles and its practical value".

The author makes distinction between impartiality of the judge and the mediator, which is oriented towards achieving transactional justice based on will, neutrality, confidentiality, trust. In this context, the author makes relevant suggestions regarding to the quality of mediators training and the necessity to establish an appropriate framework of their training in communication.

### 3. RESTORATIVE JUSTICE VS. RETRIBUTIVE JUSTICE – A SOCIO JURIDICAL PERSPECTIVE

The second section of the volume, which joins Elena Unguru provides a socio-legal perspective on averment as part of restorative justice. To identify the criminal philosophy that has been the foundation of the institution of averment and modeling of this institution identity, the authors covers the whole doctrine range related to punishment and its role over the time, also related to the successive transformation of the discourse concerning the relation of the individual with the power. An exciting history rises from the *lex talionis* towards "codified techniques of power" (the torment and the torture as body forms), to redefine the offense in terms of social danger, to the prison paradigm.

Unlike the retributive justice, the restorative justice for which the authors advocate, brings to the forefront the mediation in relationship offender-victim, the restorative gestures at the same time raising the awareness action of the perpetrator on the impact and the size of his act. The averment evolution in the world and in Europe, the averment as public service of supervision, rehabilitation and reintegration of offenders into the new Romanian regulatory, the role of social assistance in averment services, are just some of the aspects that retain the reader's attention. Considering the beneficial introduction of mediation for certain offenses, the authors propose taking over the American model of transactional justice - as extrajudicial form that allows the parties the suspending or cancelation of the trial. Moreover, they found elements of this model in the agreement of acknowledgement of reprehensibility entered by the New Code of Criminal Procedure.

The authors assert that they were interested to identify legal socio institutional redefinition of the averment in Romania. For this they sought to identify "criminal philosophies underlying the construction of averment institution both in Romania and worldwide, the historical evolution of the institution and consistency between domestic and international law, especially on the European non-custodial alternatives".

This section also develops topics such as: Deviance and Social Control; Punishment. Theoretical models; Prison paradigm versus restorative justice paradigm; Elements of averment history; The organization and operation of averment services. Peculiarities of implementation according with the new codes; Elements of social assistance in averment services; topics which strengthens the arguments of adopting a restorative and deliberative justice.

Pragmatic knowledge is accompanied by a performative attitude. In the strategies construction of the mediation is aimed the identification of certain invariant structures of communication called formal pragmatics. Performative attitude of the mediator points the adopting by the speaker of certain strategies of facilitating and enrich of his understanding by the receiver. The favorable reception attitude is the communicative action. "The expected purposes of the speakers in communicative action are always rational and justified - deserved. The success of the communicative action is the free agreement of actors, the consensus, as a form of coordination of communicational actors, social or political" this is what the authors expect to happen.

### 3. CONCLUSIONS

Undoubtedly, the volume, Communicative action, deliberative and restorative justice, as announced in title, addressed an audience extremely varied. Philosophical fundamentals, sociological, legal, political, cultural, open as many areas of interest. "The virtues of dialogue, education for justice and the observance of the law, for the Socratic self-knowledge as a precondition of social life and human solidarity, as Adriana Ciuca says in Introduction of the volume, must regain parts of our world". Although within the specific dialogue mediation process are involved multiple meanings of truth, including the theory of truth-correspondence, theory of truth- sincerity, understood as a matching between assertions and intentions, the model of communicative action has as presupposition a consensus theory of truth. In the theory of communicative action - whose favorite expression is considered mediation practice - the interviewer relationship is established and not founder. Validity derives from social conformity, more by token the truth is not a reflection of reality, but an interpretative agreement on it. Formal rationality, teleological oriented, is substituted by axiological oriented activity and will reflect consciously - or not - the interests of the issuer. The authors conclude, "communicative action is based on discursive strategies of obtaining the interpretative agreement. Rationality in Habermas's vision is highlighted in modalities which the subject acquires and uses knowledge in the communicational process".

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